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SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1951

No. 692

RING CONSTRUCTION CORPORATION,
Petitioner

vs.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above-named petitioner, prays that writ of certiorari issue to review the judgment of the United States Court of Claims granting respondent's motion to dismiss petition and entering an order dismissing the petition.

Opinions Below

The opinion rendered by the United States Court of Claims herein is reported at pages 19 *et seq.* of the record. The order and judgment made and entered by the United States Court of Claims pursuant to its opinion are found

at page 31 of the record. The judgment of the United States Court of Claims was entered on February 5, 1952.

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Section 1255, Title 28 U.S.C.A.

Questions Presented

1. The right of petitioner to full judicial hearing, within the meaning of Article 3, Section 2 of the Constitution of the United States, of the case or controversy posed by Section 403(c) of the Renegotiation Act of April 28, 1942, as amended by Section 801(a) of the Revenue Act of 1942.

2. The constitutionality of the Renegotiation Act of April 28, 1942, as amended by Section 801(a) of the Revenue Act of 1942, with respect to the creation of a debt-action in favor of the United States under the contract between petitioner and respondent let by competitive bidding prior to April 28, 1942.

3. The constitutionality of Section 403(e)(1) and (2) of the Renegotiation Act of April 28, 1942 (Public Law 528, 77th Congress, 2nd Session) as amended by Section 801(a) of Revenue Act of 1942 (Public Law 753, 78th Congress, 2nd Session), with respect to the provisions of said Section 403 (e)(1) and (2) being an express denial of a "judicial hearing" of a "case or controversy to which the United States shall be a party," within the meaning of Section 403(c) of the Renegotiation Act of April 28, 1942, as amended by Section 801(a) of the Revenue Act of 1942.

4. Whether, in view of the denial of "appellate review" and/or "judicial consideration" of questions of law underlying said case or controversy to which the United States is a party, the exactions made of and from petitioner—pursuant to the provisions of Section 403(c) of the Renegotia-

tion Act, as amended by Section 801(a) of the Revenue Act of 1942—amounts to the taking of property without due process of law, within the meaning of the Fifth Amendment to the Constitution of the United States.

Statutes Involved

The pertinent statutes, commonly called "The Renegotiation Act", are included in an appendix hereto.

Statement

The facts underlying the contractual relations between petitioner and respondent; the performance by petitioner of the obligations undertaken; and the steps taken by respondent to make the exactions complained of as being without due process of law, as well as the administrative procedure pursued, which give rise to the cause of action sued on herein, are faithfully and concisely stated and set forth in the opinion of the Court below, viz:

> The plaintiff was the successful bidder among competitive bidders for the construction, for the Government, of 490 cantonment buildings at Camp McCoy, Wisconsin. It thereupon made a contract with the Government dated March 26, 1942. It was to furnish all material, pay for all labor and complete the work within 180 days, and be subject to liquidated damages of $15 per day per building for delay in completion. The contract could be terminated at any time by the Government in its discretion. The contract, as later modified by change orders, called for payment to the plaintiff of $6,838,412.21 for the work. On October 3, 1942, the plaintiff obtained, again by competitive bidding, a similar contract for additional buildings at Camp McCoy, the contract price being $80,575.
>
> Both contracts were completed in due course, and the plaintiff was paid the agreed amounts. The plaintiff had created an unusually efficient organization to

do the work, and had made agreements with two able executives, giving them a financial incentive for efficient work. The prices bid by the plaintiff included a ten per cent hoped-for profit, but under the contract the plaintiff bore all the risks of loss, if circumstances should cause a loss. The plaintiff's gross profit on the contracts was $1,982,715.99, which, after the payment of administrative expenses and taxes, left the petitioner $292,611.14. The amounts due the plaintiff under the contract were determined in 1942, and all but $352,384.66 was paid to it in that year. The latter sum was paid to it in 1943.

On April 28, 1942, Congress enacted Public Law 528, 77th Congress, 2nd Session, Section 403 whereof provided for the renegotiation of prices of contracts thereafter made. This Act did not apply to the plaintiff's larger contract described above, which had been made shortly before the Act was passed. Section 403 was amended by Title VII, Section 801 of the Revenue Act of 1942, approved October 21, 1942, Public Law 753, 77th Congress, 2nd Session. On July 14, 1943, Public Law 149, 78th Congress, 1st Session, was adopted. It purported to subject the plaintiff's contracts to renegotiation retroactively.

On December 20, 1943, the Under Secretary of War, in spite of the plaintiff's protests as to the unconstitutionality of Public Law 149, and as to its inapplicability to the plaintiff's contracts, made a unilateral determination that the plaintiff should refund $1,365,000 to the Government as excessive profits on the two contracts.

Congress enacted Title VII, Section 701 of the Revenue Act of 1943, effective February 25, 1944, Public Law 235, 78th Congress, 2nd Session. Section 701(c)(2) required contractors dissatisfied with a unilateral determination in a renegotiation proceeding to initiate a proceeding in the Tax Court of the United States for a *de novo* determination of the amount if any, of their alleged excessive profits. The plaintiff initiated such a proceeding in the Tax Court, which, on

May 15, 1947, decided all questions of the constitutionality and applicability of the renegotiation laws adversely to the plaintiff and, on March 23 and April 6, 1948, entered orders adjudging the plaintiff to be indebted to the Government in the sum of $1,208,965.13, less credits for taxes as provided by Section 3806 of the Internal Revenue Code.

The plaintiff sought an appellate review of the decision of the Tax Court by the United States Court of Appeals for the District of Columbia, but obtained no relief there. While its appeal proceeding was pending, it paid the sum determined by the Tax Court, which, after credit for taxes, was $210,479.31. This reduced the plaintiff's economic benefits from the performance of its contracts to practically nothing. The Tax Court did not apply proper rules of substantive or procedural law in the proceedings before it. The plaintiff has exhausted all administrative remedies.

The Government, to enforce the unilateral determination made by the Under Secretary of War against the plaintiff, brought a civil action against the plaintiff in the United States District Court for the Fourth Division of the State of Minnesota. After the decision by the Tax Court that the plaintiff was indebted to the Government in the sum of $1,208,965.13 less credit for taxes, the plaintiff, on July 21, 1948, paid to the Government $210,479.31, which was the correct amount as computed by the parties. Upon the payment of this sum the parties agreed that it should be regarded as paid under protest with the reservation of whatever rights, if any, the plaintiff might have in the future to recover it, or any part of it. The stipulation was made with the intention that the plaintiff should still have its day in court in the suit then pending in the District Court of Minnesota, wherein it attacked the constitutionality of the Renegotiation Acts, and asserted its right to judicial review of the decision of the Tax Court. But the Government dismissed its suit against the plaintiff in the District Court in Minnesota, so far as the principal sum involved was concerned, leaving only the question

of interest in litigation. The dismissal was approved by the District Court. Because the amount claimed by the plaintiff was more than $10,00, the District Court had no jurisdiction to give plaintiff a judgment for the recovery of the amount it had paid. Wherefore, the plaintiff sues in this court.

The basis of plaintiff's claim is that $210,479.31 which it had lawfully acquired by performing its contracts with the Government has been taken from it by the Government; that the Renegotiation Act by which it was taken is unconstitutional, at least as applied to the plaintiff's contracts, or is, when properly construed, inapplicable to them; that in any event the plaintiff is entitled to its day in court to prevent the Government from taking the money, or to get it back; that its only right to a hearing under the Renegotiation Acts was to the hearing in the Tax Court, an executive agency; that the attempt of Congress to limit it to such a hearing was unconstitutional; and that therefore it has a right to sue in this court on the theory that its money was taken and the Government has impliedly promised to pay it back.

Specifications of Error

The United States Court of Claims erred:

1. In holding that the decision of the Court of Appeals of the District of Columbia—wherein it expressly declined to exercise any authority to grant appellate review of any questions of law except the question of the constitutionality of the Renegotiation Act, as amended, and as passed upon by The Tax Court as a part of its opinion—makes the fact of petitioner's alleged indebtedness to the United States an adjudicated question, within the meaning of Article 3, Section 2 of the Constitution of the United States; and

2. By granting respondent's motion to dismiss the petition in this action.

Reasons for Granting Writ

1. The unilateral determination of the Secretary of War of December 20th, 1943, which is made the basis of a *de novo* proceeding before The Tax Court of the United States within the meaning of Section 403(e)(1) and (2) of the Renegotiation Act (as amended by Section 701(b) of the Revenue Act of 1943) is deemed to be the basis of a debt-action against petitioner (see Section 403(e) of Public Law 528, as amended by Section 801(a) of the Revenue Act of 1942, Public Law 753); and, with respect to the rights of petitioner to defend its alleged liability for said debt, the right to a full judicial hearing cannot be denied to petitioner under the provisions of Article 3, Section 2 of the Constitution of the United States. (See *St. Joseph Stockyards Company* v. *United States*, 298 U.S. 38).

2. The provisions of Section 403(e)(1) and (2) of the Renegotiation Act, as amended by Section 701(b) of the Revenue Act of 1943 (Public Law 235) are not made applicable to fiscal years ending prior to July 1, 1943 with respect to the debt-claim against petitioner for the year 1942; and with respect to petitioner's right to defend itself from liability on said debt, the right to a full judicial hearing and/or a full and complete "appellate review" as a substitute for "judicial consideration" may not be denied under Article 3, Section 2 of the Constitution of the United States. (See *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U.S. 456).

3. Petitioner, although restricted by rules of administrative procedure, has sought to defend itself against said debt-claim (a) by questioning the constitutionality of the Renegotiation Act under which the debt-claim is made; and (b) in the alternative, claiming the right to full "judicial consideration" of the basic elements of said debt-claim. (See

Ring Construction Corporation v. *Secretary of War,* 178 Fed. (2d) 714).

4. The underlying ingredients of the debt-claim of respondent against defendant involve basic questions of law; rules of procedure with respect to a determination of the amount of said debt; rules of evidence; the substantial quality of evidence to support the claim; the construction of contracts and agreements underlying the claim; and in fact, all manner of questions and issues that are ordinarily and traditionally submitted to "judicial consideration" so as to avoid the issue of confiscation under color of law. However, a "judicial hearing" thereon has been denied petitioner (see *Ring Construction Corporation* v. *Secretary of War,* 178 Fed. (2d) 714).

5. In order that the proceeding before The Tax Court of the United States, as provided by Section 403(e)(1) and (2) of the Renegotiation Act, as amended by Section 701(b) of Revenue Act of 1943 (Public Law 235) be the equivalent of a judicial hearing and/or judicial consideration on the issue of confiscation, appellate review within the meaning of Sections 1141 and 1142, Title 26 USCA, is required. (See *Dayton-Goose Creek Ry. Co.* v. *United States, supra,* and *Old Colony Trust Company* v. *Commissioner,* 279 U.S. 716).

6. Petitioner could not within the purview of *Lichter* v. *United States,* 334 U.S. 742, and/or *Aircraft & D. Equipment Corporation,* 331 U.S. 752, escape the necessity of seeking review of the debt-claim of respondent by The Tax Court of the United States; but, when petitioner sought its coterminous right of appellate review—analogous in such posture of the case to a "judicial hearing"—the United States Court of Appeals for the District of Columbia, at 178 Fed. (2d) 714, says with apparent finality, viz:

> "The questions raised by the petitioner, other than the constitutionality of the statute when retroactively

applied, are not open to review by this court. Section 403(e) of the original Act, as amended by Section 701 of the Second Renegotiation Act (Revenue Act of 1943, Title VII), provides that upon the filing of a petition for redetermination, the Tax Court

> '. . . shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency.'

With respect to this unequivocal language we said in *U. S. Electrical Motors, Inc.* v. *Jones*, 80 U.S. App. D.C. 329, 331, 153 F. (2d) 134, 136 (1946):

> '. . . We think . . . the statute places exclusive and unreviewable jurisdiction in the Tax Court to determine the amount of excessive profits, including questions of both law and fact in such determination, . . .'

We do not stop, therefore, to state or examine the faults found by the petitioner with the procedure and determination of the Tax Court, but pass on to its argument that the Congress did not intend the Renegotiation Act to apply retroactively and that if so applied the statute is unconstitutional."

7. The United States Court of Appeals in the cases of *U. S. Electrical Motors, Inc.* v. *Jones*, 153 Fed. (2d) 134, and *Blanchard Machine Co.* v. *Board*, 177 Fed. (2d) 727, holds that it may review fundamental questions of "constitutional law" involved and/or questions of fact and substantive law involving the jurisdiction of The Tax Court to review claims for debt by respondent under the Renegotiation Act, as amended; but with respect to judicial consideration of adjective questions of law and facts on the merits of the debt-action of respondent—having to do with defenses interposed thereto—it holds that "appellate review" and/or "judicial consideration" is expressly denied. (See *Ring*

Construction Corporation v. *Secretary of War,* 178 Fed. (2d) 714.)

8. On the other hand, the United States Court of Appeals for the Ninth Circuit in *French* v. *War Contracts Price Adjustment Board,* 182 Fed. (2d) 560, holds that the Courts of Appeals have no jurisdiction at all with respect to appellate review and/or judicial consideration of decisions by The Tax Court in debt-actions under the Renegotiation Act, as amended.

9. There is a serious conflict between the cases of *U. S. Electrical Motors, Inc.* v. *Jones; Blanchard Machine Co.* v. *Board;* and *French* v. *War Contracts Price Adjustment Board, supra,* on the question of whether a decision by The Tax Court may be reviewed in any respect by appeal to the Courts of Appeals, within the meaning of Section 403(e)(1) and (2) of the Renegotiation Act, as amended by Section 701(b) of the Revenue Act of 1943; and when the Court of Claims of the United States in this proceeding accepts as *res adjudicata* the decision of the United States Court of Appeals for the District of Columbia in *Ring Construction Corporation, supra,* the conflict posed appears irreconcilable.

10. In the maze of conflicting decisions that now exist on the simple question of "judicial consideration" that petitioner should have at some stage of the controversy posed by the Renegotiation Act, as amended, it would appear that under the principles of *Brinkerhoff-Faris Trust & Savings Company* v. *Hill,* 281 U.S. 673, the questions reserved in the case of *Lichter* v. *United States, supra,* are presented squarely and properly within the meaning of Article 3, Section 2 of the Constitution. (See *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U.S. 456).

11. Respondent has in all cases and controversies arising under the Renegotiation Act, as amended, resisted the

claims of adversaries to judicial consideration; judicial hearing; and/or judicial appellate review on the merits of the debt-action. (See *U. S. Electrical Motors, Inc.; Blanchard Machine Co.; Ring Construction Corporation;* and *French, supra*). The theory of respondent is that the decision in *Lichter* v. *United States, supra,* proscribes "judicial hearing", "judicial consideration", and/or "judicial appellate review" on the merits in such cases or controversies.

12. In view of the decision in the case of *French* v. *War Contracts Price Adjustment Board, supra,* there is grave doubt about the decision in *Ring Construction Corporation* v. *Secretary of War, supra,* being *res adjudicata* on the issues presented in this proceeding; and the conflict thus presented appears to be of substantial public importance.

13. The administrative tribunal of The Tax Court was not a choice of forum by petitioner; nor was there any choice of forum with respect to "appellate review" of the determination of The Tax Court of the United States as a substitute for "judicial consideration" (see *Dayton-Goose Creek Ry. Co., supra*). Therefore, if there be a forum for "judicial consideration" at some stage of the exaction, the choice appears to be the Court of Claims.

14. The broad language of Section 403(c)(1) and (2) of the Renegotiation Act, as amended by Section 701(b) of the Revenue Act of 1943, encompasses a denial of "judicial consideration" in any category of procedure under the debt-claim of respondent against petitioner; and with respect to such broad language being a denial of due process of law, the decision of the Court below is reviewable by this Honorable Court under the principles of *Luckenbach Steamship Company* v. *United States,* 272 U.S. 533, within the meaning of Article 3, Section 2 of the Constitution.

15. The Congress may grant a right of action to the United States, as provided by Section 403(c) of the Renego-

tiation Act, as amended by Section 801(a) of the Revenue Act of 1942; and may impose upon a citizen of the United States an implied promise to repay to the United States "excessive profits" realized, due to the inability of officials to appraise the fair value of benefits received by the United States under "contracts of necessity". However, the Fifth Amendment to the Constitution of the United States prohibits the denial of due process of law as contemplated by Section 403(e)(1) and (2) of the Renegotiation Act, as amended by Section 701(b) of the Revenue Act of 1943. The *Lichter case, supra,* stops short of an approval of Section 403(e)(1) and (2) being due process of law; and in the case of *Macauley* v. *Waterman Steamship Company,* 327 U.S. 540, it declined to consider the question of its constitutionality until after the contractor had exhausted the *administrative procedure* required of it by such section.

16. The questions reserved in the case of *Lichter* v. *United States, supra,* and posed in the case of *Macauley* v. *Waterman Steamship Company,* 327 U.S. 540, are now squarely present on the issues of whether the decision of the United States Court of Appeals in *Ring Construction Corporation* v. *Secretary of War, supra,* is *res adjudicata* on the right of petitioner to a "judicial hearing" within the meaning of Article 3, Section 2 of the Constitution of the United States. (See *French* v. *War Contracts Price Adjustment Board, supra*).

17. At the time the case of *Ring Construction Corporation* v. *Secretary of War,* 178 Fed. (2d) 714, was heard before The Tax Court and considered by that tribunal in its opinion of May 15, 1947, the case of *Lichter* v. *United States,* 334 U.S. 742, had not been decided. The opinion in the *Lichter case* was rendered June 14, 1948; and in view of the decision in the *Lichter case* the question of law that the United States Court of Appeals for the District of Columbia undertook to decide in the case of *Ring Construction*

Corporation v. *Secretary of War, supra,* had become moot at the date of its opinion on November 7, 1949. The decision in the *Lichter case* was rendered during the pendency of the appeal in the case of *Ring Construction Corporation* v. *Secretary of War, supra.*

18. The only finality to be attributed to the decision of The Tax Court in the case or controversy posed by Section 403(c) of the Renegotiation Act, as amended by Section 801 (a) of the Revenue Act of 1942, is found in the provisions of Section 403(e) of said Act, as amended by Section 701(b) of the Revenue Act of 1943; and inasmuch as the Court of Appeals for the District of Columbia in *Ring Construction Corporation* v. *Secretary of War, supra,* speaks only of its lack of jurisdiction to grant appellate review of the decision of The Tax Court, the decision of the Court below to the effect "that the fact of plaintiff's indebtedness to the United States is a *res adjudicata*", attributes a feature to the decision of the Court of Appeals for the District of Columbia in *Ring Construction Corporation* v. *Secretary of War, supra,* that is not clear from the language of its opinion.

19. The Court below appears to hold that decisions of The Tax Court in "renegotiation cases" are fully reviewable by United States Courts of Appeals, within the meaning of Sections 1141 and 1142, Title 26 USCA, notwithstanding the provisions of Section 403(e) of the Renegotiation Act, as amended by Section 701(b) of the Revenue Act of 1943, and for that reason the conflict posed by the decision of the United States Court of Appeals for the Ninth Circuit in the case of *French* v. *War Contracts Price Adjustment Board, supra,* is made conclusively clear.

20. In view of the limited review granted by the United States Court of Appeals for the District of Columbia in *Ring Construction Corporation* v. *Secretary of War, supra,* as to the "fact of petitioner's indebtedness to the United

States", it would appear that if its decision is to be made final under the principles of *res adjudicata* as held by the Court below, the fact that Section 403(e) of the Renegotiation Act, as amended by Section 701(b) of the Revenue Act of 1943, is a denial of due process of law is inescapable under the provisions of Article 3, Section 2 of the Constitution. The Courts of the United States, as defined by Article 3, Section 2 of the Constitution, may not abdicate their functions; nor may the Congress relegate the jurisdiction of the Courts of the United States to the simple functions of enforcing administrative decisions as proposed by Sections 403(c) and (e) of the Renegotiation Act, as amended by Section 801(a) of the Revenue Act of 1942 and Section 701 (b) of the Revenue Act of 1943, without violating the "due process clause" of the Fifth Amendment to the Constitution of the United States (see *St. Joseph Stockyards Company* v. *United States; Dayton-Goose Creek Ry. Co.* v. *United States;* and *Brinkerhoff-Faris Trust & Savings Company, supra*).

21. The decision of the United States Court of Appeals for the District of Columbia in *Ring Construction Corporation* v. *Secretary of War*, 178 Fed. (2d) 714, may not be deemed a *res adjudicata*, as indicated by the Court below, unless:

(a) That Court had full and complete jurisdiction to hear the appeal considered; or

(b) There is a right of review of the question of its jurisdiction, within the meaning of Sections 1141 and 1142, Title 26 USCA. (See *Old Colony Trust Company* v. *Commissioner, supra.*)

22. The decision in the case of *French* v. *War Contracts Price Adjustment Board*, 182 Fed. (2d) 560, makes the question of *res adjudicata* herein, as decided by the Court below, an issue of grave consequences to the jurisprudence of the United States.

23. Where a Court undertakes to decide the question of its jurisdiction, limited and/or general; and there be no right of a review of such determination, the matter of it being a collateral estoppel as to the parties thereto in the category of a *res adjudicata* of the issues involved but not there decided, presents a question of substantial importance to the jurisprudence of the United States. (See *U. S. Electrical Motors, Inc.* v. *Jones, supra; Stoll* v. *Gottlieb,* 59 S. Ct. Rep. 134; 305 U.S. 165; *Baldwin* v. *Iowa State Traveling Men's Association,* 51 S. Ct. 517; 283 U.S. 522; *Dowell* v. *Applegate,* 152 U.S. 327; 14 S. Ct. 611; *Valley* v. *Northern Fire & Marine Insurance Co.,* 41 S. Ct. 116; 254 U.S. 348; *American Law Institute,* Judgments, Sec. 10.)

Prayer for Writ

Wherefore petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Claims commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a transcript of the record and proceedings herein. Your petitioner further prays that the judgment of the United States Court of Claims be reversed by this Honorable Court, and that petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated this the 7th day of April, 1952.

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APPENDIX

THE RENEGOTIATION ACT

I

Sixth Supplemental National Defense Appropriation Act, 1942. The Act of April 28, 1942 (Public Law 528, 77th Congress, 2d Sess.)

SEC. 403. (a) For the purposes of this section, the term "Department" means the War Department, the Navy Department, and the Maritime Commission, respectively; in the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission; and the terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price. For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.

(b) The Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department (1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; (2) a provision for the retention by the United States or the repayment to the United States of (A) any amount of the contract price which is found as a result of such renegotiation to represent excessive profits and (B) an amount of the contract price equal to the amount of the reduction in the contract price of any subcontract under such contract pursuant to the renegotiation of such subcontract as provided in clause (3) of this subsection; and (3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (A) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be deter-

mined with reasonable certainty, (B) a provision for the retention by the United States or the repayment to the United States of any amount of the contract price of the subcontract which is found as a result of such renegotiation, to represent excessive profits, and (C) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by or repaid to the United States.

(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor. Such contractor or subcontractor shall be deemed to be indebted to the United States for any amount which such Secretary is authorized to recover from such contractor or subcontractor under this subsection, and such Secretary may bring actions in the appropriate courts of the United States to recover such amount on behalf of the United States. All amounts recovered under this subsection shall be covered into the Treasury as miscellaneous receipts. This subsection shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act.

(d) In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other

compensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable. For the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been or are being set up, or whether any excessive and unreasonable costs have been or are being incurred, each such Secretary shall have the same powers with respect to any such contractor that an agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of each such Secretary and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purposes of making examinations and determinations with respect to profits under this section.

(e) In addition to the powers conferred by existing law, the Secretary of each Department shall have the right to demand of any contractor who holds contracts with respect to which the provisions of this section are applicable in an aggregate amount in excess of $100,000, statements of actual costs of production and such other financial statements, at such times and in such form and detail, as such Secretary may require. Any person who willfully fails or refuses to furnish any statement required of him under this subsection, or who knowingly furnishes any such statement containing information which is false or misleading in any material respect, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both. The powers conferred by this subsection shall be exercised in the case of any contractor by the Secretary of the Department holding the largest amount of such contracts with such con-

tractor, or by such Secretary as may be mutually agreed to by the Secretaries concerned.

(f) The authority and discretion herein conferred upon the Secretary of each Department, in accordance with regulations prescribed by the President for the protection of the interests of the Government, may be delegated, in whole or in part, by him to such individuals or agencies in such Department as he may designate, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(g) If any provisions of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

(h) This section shall remain in force during the continuance of the present war and for three years after the termination of the war, but no court proceedings brought under this section shall abate by reason of the termination of the provisions of this section.

II

Revenue Act of 1942. The Act of October 21, 1942 (Public Law 753, 77th Congress, 2d Sess.)

TITLE VIII—RENEGOTIATION OF WAR CONTRACTS

SEC. 801. RENEGOTIATION OF WAR CONTRACTS.

(a) Subsections (a), (b), and (c) of section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), are amended to read as follows:

SEC. 403. (a) For the purposes of this section—

(1) The term "Department" means the War Department, the Navy Department, the Treasury Department, and the Maritime Commission, respectively.

(2) In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission.

(3) The terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price.

(4) The term "excessive profits" means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

(5) The term "subcontract" means any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term "article" includes any material, part, assembly, machinery, equipment, or other personal property.

For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.

(b) Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department—

(1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty;

(2) a provision for the retention by the United States from amounts otherwise due the contractor, or for the repayment by him to the United States; if paid to him, of any excessive profits not eliminated through reductions in the contract price, or otherwise, as the Secretary may direct;

(3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (i) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the

profits can be determined with reasonable certainty, (ii) a provision for the retention by the contractor for the United States of the amount of any reduction in the contract price of any subcontract pursuant to its renegotiation hereunder, or for the repayment by the subcontractor to the United States of any excessive profits from such subcontract paid to him and not eliminated through reductions in the contract price or otherwise, as the Secretary may direct, and (iii) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by the contractor or repaid by the subcontractor to the United States, and (iv) in the discretion of the Secretary, a provision requiring any subcontractor to insert in any subcontract made by him under such subcontract, provisions corresponding to those of subparagraphs (3) and (4) of this subsection (b); and

(4) a provision for the retention by the United States from amounts otherwise due the contractor, or for repayment by him to the United States, as the Secretary may direct, of the amount of any reduction in the contract price of any subcontract under such contract, which the contractor is directed, pursuant to clause (3) of this subsection, to withhold from payments otherwise due the subcontractor and actually unpaid at the time the contractor receives such direction.

The provision for the renegotiation of the contract price, in the discretion of the Secretary, (i) may fix the period or periods when or within which renegotiation shall be had; and (ii) if in the opinion of the Secretary the provisions of the contract or subcontract are otherwise adequate to prevent excessive profits, may provide that renegotiation shall apply only to a portion of the contract or subcontract or shall not apply to performance during a specified period or periods and may also provide that the contract price in effect during any such period or periods shall not be subject to renegotiation.

(c) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract (i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (v) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts.

(3) In determining the excessiveness of profits

realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the character which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2E of the Internal Revenue Code. In determining the amount of any excessive profits to be eliminated hereunder the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in section 3806 of the Internal Revenue Code.

(4) Upon renegotiation pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section, as the Secretary deems desirable. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable. Any such agreement shall be final and conclusive according to its terms; and except upon a showing of fraud or malfeasance or a wilful misrepresentation of a material fact, (i) such agreement shall not be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States; and (ii) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

(5) Any contractor or subcontractor who holds contracts or subcontracts, to which the provisions of this section are applicable, may file with the Secretaries of all the Departments concerned statements of actual costs of production and such other financial statements for any prior fiscal year or years of such contractor or subcontractor, in such form and detail, as the Secretaries shall prescribe by joint regulation. Within one year after the filing of such statements, or within such shorter period as may be prescribed by such joint regu-

lation, the Secretary of a Department may give the contractor or subcontractor written notice, in form and manner to be prescribed in such joint regulation, that the Secretary is of the opinion that the profits realized from some or all of such contracts or subcontracts may be excessive, and fixing a date and place for an initial conference to be held within sixty days thereafter. If such notice is not given and renegotiation commenced by the Secretary within such sixty days the contractor or subcontractor shall not thereafter be required to renegotiate to eliminate excessive profits realized from any such contract or subcontract during such fiscal year or years and any liabilities of the contractor or subcontractor for excessive profits realized during such period shall be thereby discharged.

(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942, or (ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i), of this section 403, or (iii) the aggregate sales by the contractor or subcontractor, and by all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder do not exceed, or in the opinion of the Secretary concerned will not exceed, $100,000 for the fiscal year of such contractor or subcontractor.

No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs.

(b) Subsection (f) of section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), is amended to read as follows:

(f) Subject to any regulations which the President may prescribe for the protection of the interests of the Government, the authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, or in any other Department with the consent of the Secretary of that Department, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(c) Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), is amended by adding at the end thereof the following subsections:

(i) (1) The provisions of this section shall not apply to—

(i) any contract by a Department with any other department, bureau, agency, or governmental corporation of the United States or with any Territory, possession, or State or any agency thereof or with any foreign government or any agency thereof; or

(ii) any contract or subcontract for the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, which has not been processed, refined, or treated beyond the first form or state suitable for industrial use; and the Secretaries are authorized by joint regulation, to define, interpret, and apply this exemption.

(2) The Secretary of a Department is authorized, in his discretion, to exempt from some or all of the provisions of this section—

(i) any contract or subcontract to be performed outside of the territorial limits of the continental United States or in Alaska;

(ii) any contracts or subcontracts under which, in the opinion of the Secretary, the profits can be deter-

mined with reasonable certainty when the contract price is established, such as certain classes of agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimum price for the sale of which has been fixed by a public regulatory body, of leases and license agreements, and of agreements where the period of performance under such contract or subcontract will not be in excess of thirty days; and

(iii) a portion of any contract or subcontract or performance thereunder during a specified period or periods, if in the opinion of the Secretary, the provisions of the contract are otherwise adequate to prevent excessive profits.

The Secretary may so exempt contracts and subcontracts both individually and by general classes or types.

(j) Nothing in sections 109 and 113 of the Criminal Code (U. S. C., title 18, secs. 198 and 203) or in section 190 of the Revised Statutes (U. S. C., title 5, sec. 99) shall be deemed to prevent any person appointed by the Secretary of a Department for intermittent and temporary employment in such Department, from acting as counsel, agent, or attorney for prosecuting any claim against the United States: *Provided,* That such person shall not prosecute any claim against the United States (1) which arises from any matter directly connected with which such person is employed, or (2) during the period such person is engaged in intermittent and temporary employment in a Department.

(d) The amendments made by this section shall be effective as of April 28, 1942.

Approved, October 21, 1942, 4:30 p. m.

Military Appropriation Act 1944. The Act of July 1, 1943 (Public Law 108, 78th Congress, 2d Sess.)

Provided further, That clauses (1) and (2) of subsection (a) of section 403 of the Sixth Supplemental National De-

fense Appropriation Act, 1942, as amended, are amended to read as follows:

SEC. 403. (a) For the purposes of this section—

1. The term "Department" means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

2. In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term "Secretary" means the board of directors of the appropriate corporation.

Provided further, That section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, is further amended by adding at the end thereof the following subsection:

(k) All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company.

IV

The Act of July 14, 1943 (Public Law 149, 78th Congress, 1st Sess.)

AN ACT

To prevent the payment of excessive fees or compensation in connection with the negotiation of war contracts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of section 403 (a) (5) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, is amended to read as follows: "The term 'subcontract' means (i) any purchase order or agreement

to perform all or any part of the work, or to make or furnish any article, required for the performance of any other contract or subcontract or (ii) any contract or arrangement (other than a contract or arrangement between two contracting parties, one of which parties is found by the Secretary to be a bona fide executive officer, partner, or full-time employee of the other contracting party), (A) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts thereunder, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, or (B) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts thereunder: *Provided*, That nothing in this sentence shall be construed (1) to affect in any way the validity or construction of provisions in any contract with a Department or any subcontract thereunder, heretofore at any time or hereafter made, prohibiting the payment of contingent fees or commissions; or (2) to restrict in any way the authority of the Secretary to determine the nature or amount of selling expenses under subcontracts as defined in (ii) herein, as a proper element of the contract price or as a reimbursable item of cost, under a contract with a Department or a subcontract thereunder."

SEC. 2. Section 403 (b) (3) of such Act, as amended, is amended by striking out "in each subcontract for an amount in excess of $100,000" and inserting in lieu thereof "in each subcontract described in subsection (a) (5) (ii) and in each subcontract for an amount in excess of $100,000 described in subsection (a) (5) (i)".

SEC. 3. The first paragraph of section 403 (c) (6) of such Act, as amended, is amended to read as follows:

> (6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made

prior to April 28, 1942; or (ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i), of this section 403; or (iii) the aggregate sales by and amounts payable to the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder (including those described in clauses (i) and (ii) of this subsection (6), but excluding subcontracts described in subsection (a) (5) (ii)) do not exceed, or in the opinion of the Secretary will not exceed, $100,000, and under subcontracts described in subsection (a) (5) (ii) do not exceed, or in the opinion of the Secretary will not exceed, $25,000, for the fiscal year of such contractor or subcontractor.

SEC. 4. Section 403 (e) of such Act, as amended, is amended by striking out "in an aggregate amount in excess of $100,000".

SEC. 5. The amendments made by this Act shall be effective as of April 28, 1942.

Approved July 14, 1943.

V

Revenue Act of 1943. The Act of February 25, 1944 (Public Law 235, 78th Congress, 2d Sess.)

TITLE VII—RENEGOTIATION OF WAR CONTRACTS

SEC. 701. RENEGOTIATION OF WAR CONTRACTS.

(a) *Terms Used.*—Terms used in this section shall have the same meaning as when used in section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

(b) *Renegotiation of War Contracts.*—Section 403, as amended, of the Sixth Supplemental National Defense Appropriation Act, 1942, is amended to read as follows:

SEC. 403. (a) For the purposes of this section—

(1) The term "Department" means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, the War Shipping

Administration, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

(2) In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission, in the case of the War Shipping Administration, the term, "Secretary" means the Administrator of such Administration, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term "Secretary" means the board of directors of the appropriate corporation.

(3) The terms "renegotiate" and "renegotiation" include a determination by agreement or order under this section of the amount of any excessive profits.

(4) (A) The term "excessive profits" means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this section to be excessive. In determining excessive profits there shall be taken into consideration the following factors:

(i) efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs and economy in the use of materials, facilities, and manpower;

(ii) reasonableness of costs and profits, with particular regard to volume of production, normal pre-war earnings, and comparison of war and peacetime products;

(iii) amount and source of public and private capital employed and net worth;

(iv) extent of risk assumed, including the risk incident to reasonable pricing policies;

(v) nature and extent of contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance.

(vi) character of business, including complexity of manufacturing technique, character and extent of subcontracting and rate of turnover;

(vii) such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted.

(B) The term "profits derived from contracts with the Departments and subcontracts" means the excess of the amount received or accrued under such contracts and subcontracts over the costs paid or incurred with respect thereto. Such costs shall be determined in accordance with the method of cost accounting regularly employed by the contractor in keeping his books, but if no such method of cost accounting has been employed, or if the method so employed does not, in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States properly reflect such costs, such costs shall be determined in accordance with such method as in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States does properly reflect such costs. Irrespective of the method employed or prescribed for determining such costs, no item of cost shall be charged to any contract with a Department or subcontract or used in any manner for the purpose of determining such cost, to the extent that in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States, such item is unreasonable or not properly chargeable to such contract or subcontract. Notwithstanding any other provisions of this section, all items estimated to be allowable as deductions and exclusions under Chapters 1 and 2 E of the Internal Revenue Code (excluding taxes measured by income) shall, to the extent allocable to such contracts and subcontracts (or, in the case of the recomputation of the amortization deduction, allocable to contracts with the Departments and subcontracts), be allowed as items of cost, but in determining the amount of excessive profits to be eliminated proper adjustment shall be made on account of the taxes so excluded, other than Federal

taxes, which are attributable to the portion of the profits which are not excessive.

(C) Notwithstanding any of the provisions of this section to the contrary, no amount shall be allowed as an item of cost (i) by reason of a recomputation of the amortization deduction pursuant to section 124 (d) of the Internal Revenue Code until after such recomputation has been made in connection with a determination of the taxes imposed by Chapters 1, 2A, 2B, 2D, and 2E of the Internal Revenue Code for the fiscal year to which the excessive profits determined by the renegotiation are attributable or (ii) by reason of the application of a carry-over or carry-back under any circumstances. The absence of such a recomputation of the amortization deductions referred to in clause (i) above shall not constitute a cause for postponing the making of an agreement, or the entry of an order, determining the amount of excessive profits, or for staying the elimination thereof.

(D) Notwithstanding any of the provisions of subsection (c) (4) of this section to the contrary, in the case of a renegotiation which is made prior to such recomputation, there shall be repaid by the United States (without interest) to the contractor or subcontractor after such recomputation the amount of a net renegotiation rebate computed in the following described manner. There shall first be ascertained the portion of the excessive profits determined by the renegotiation which is attributable to the fiscal year with respect to which a net renegotiation rebate is claimed by the contractor or subcontractor (hereinafter referred to as "renegotiated year"). There shall then be ascertained the amount of the gross renegotiation rebate for the renegotiated year, which amount shall be an allocable part of the additional amortization deduction which is allowed for the renegotiated year upon the recomputation made pursuant to section 124 (d) of the Internal Revenue Code in connection with the determination of the taxes for such year and which is attributable to contracts with

the Departments and subcontracts, except that the amount of the gross renegotiation rebate shall not exceed the amount of excessive profits eliminated for the renegotiated year pursuant to the renegotiation. The allocation of the additional amortization deduction attributable to contracts with the Departments and subcontracts, and the allocation of the additional amortization deduction to the renegotiated year shall be determined in accordance with regulations prescribed by the Board. There shall then be ascertained the amount of the contractor's or subcontractor's Federal tax benefit from the renegotiation for the renegotiated year. Such Federal tax benefit shall be the amount by which the taxes for the renegotiated year under Chapters 1, 2A, 2B, 2D, and 2E of the Internal Revenue Code were decreased by reason of omitting from gross income (or by reason of the application of the provisions of section 3806 (a) of the Internal Revenue Code with respect to) that portion of the excessive profits for the renegotiated year which is equal to the amount of the gross renegotiation rebate. The amount by which the gross renegotiation rebate for the renegotiated year exceeds the amount of the contractor's or subcontractor's Federal tax benefit from the renegotiation for such year shall be the amount of the net renegotiation rebate for such year.

(5) The term "subcontract" means—

(A) Any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of any other contract or subcontract, but such term does not include any purchase order or agreement to furnish office supplies; or

(B) Any contract or arrangement other than a contract or arrangement between two contracting parties, one of which parties is found by the Board, to be a bona fide executive officer, partner, or full-time employee of the other contracting party, (i) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or

of a subcontract or subcontracts, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, or (ii) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts: *Provided,* That nothing in this sentence shall be construed (1) to affect in any way the validity or construction of provisions in any contract with a Department or any subcontract, heretofore at any time or hereafter made, prohibiting the payment of contingent fees or commissions; or (2) to restrict in any way the authority of the Secretary or the Board to determine the nature or amount of selling expenses under subcontracts as defined in this subparagraph, as a proper element of the contract price or as a reimbursable item of cost, under a contract with a Department or a subcontract.

(6) The term "article" includes any material, part, assembly, machinery, equipment, or other personal property.

(7) The term "standard commercial article" means an article—

(A) which is identical in every material respect with an article which was manufactured and sold, and in general civilian, industrial, or commercial use prior to January 1, 1940,

(B) which is identical in every material respect with an article which is manufactured and sold, as a competitive product, by more than one manufacturer, or which is an article of the same kind and having the same use or uses as an article manufactured and sold, as a competitive product, by more than one manufacturer, and

(C) for which a maximum price has been established and is in effect under the Emergency Price Control Act of 1942, as amended, or under the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing infla-

tion, and for other purposes," or which is sold at a price not in excess of the January 1, 1941, selling price. An article made in whole or in part of substitute materials but otherwise identical in every material respect with the article with which it is compared under subparagraphs (A) and (B) shall be considered as identical in every material respect with such article with which it is so compared.

(8) The term "fiscal year" means the taxable year of the contractor or subcontractor under Chapter 1 of the Internal Revenue Code.

(9) The terms "received or accrued" and "paid or incurred" shall be construed according to the method of accounting employed by the contractor or subcontractor in keeping his books.

(b) Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in each contract made by such Department thirty days or more after the date of the enactment of the Revenue Act of 1943 and involving an estimated amount of more than $100,000, a provision under which the contractor agrees—

(1) to the elemination of excessive profits through renegotiation;

(2) that there may be retained by the United States from amounts otherwise due the contractor, or that he will repay to the United States, if paid to him, any excessive profits;

(3) that he will insert in each subcontract described in subsection (a) (5) (A) involving an estimated amount of more than $100,000, and in each subcontract described in subsection (a) (5) (B) involving an estimated amount of more than $25,000, a provision under which the subcontractor agrees—

(A) to the elimination of excessive profits through renegotiation;

(B) that there may be retained by the contractor for the United States from amounts otherwise due the subcontractor, or that the subcontractor will repay to the United States, if paid to him, any excessive profits;

(C) that the contractor shall be relieved of all liability to the subcontractor on account of any amount so retained, or so repaid by the subcontractor to the United States;

(D) that he will insert in each subcontract described in subsection (a) (5) (A) involving an estimated amount of more than $100,000, and in each subcontract described in subsection (a) (5) (B) involving an estimated amount of more than $25,000, provisions corresponding to those of subparagraphs (A), (B), and (C) and to those of this subparagraph;

(4) that there may be retained by the United States from amounts otherwise due the contractor, or that he will repay to the United States, as the Secretary may direct, any amounts which under paragraph (3) (B) the contractor is directed to withhold from a subcontractor and which are actually unpaid at the time the contractor receives such direction.

The obligations assumed by the contractor or subcontractor under paragraph (1) or (3) (A), as the case may be, agreeing to the elimination of excessive profits through renegotiation shall be binding on him only if the contract or subcontract, as the case may be, is subject to subsection (c). A provision inserted in a contract or subcontract, which recites in substance that the contract or subcontract shall be deemed to contain all the provisions required by this subsection shall be sufficient compliance with this subsection. Whether or not there is inserted in a contract with a Department or subcontract, to which subsection (c) is applicable, the provisions specified in this subsection, such contract or subcontract, as the case may be, shall be considered as having been made subject to such subsection in the same manner and to the same extent as if such provisions had been inserted.

(c) (1) Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of

the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding. At the conference, which may be adjourned from time to time, the Board shall endeavor to make a final or other agreement with the contractor or subcontractor with respect to the elimination of excessive profits received or accrued, and with respect to such other matters relating thereto as the Board deems advisable. Any such agreement, if made, may, with the consent of the contractor or subcontractor, also include provisions with respect to the elimination of excessive profits likely to be received or accrued. If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (e) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. The Board shall exercise its powers with respect to the aggregate of the amounts received or accrued during the fiscal year (or such other period as may be fixed by mutual agreement) by a contractor or subcontractor under contracts with the Departments and subcontracts, and not separately with respect to amounts received or accrued under separate contracts with the Departments or subcontracts, except that the Board may exercise such power separately with respect to amounts received or accrued by the contractor or subcontractor under any one or more separate contracts with the Departments or subcontracts at the request of the contractor or subcontractor. Whenever the Board makes a determination with respect to the amount of excessive profits, whether such determination is made by order or is embodied in an

agreement with the contractor or subcontractor, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination. Such statement shall not be used in The Tax Court of the United States as proof of the facts or conclusions stated therein.

(2) Upon the making of an agreement, or the entry of an order, under paragraph (1) by the Board, or the entry of an order under subsection (e) by The Tax Court of the United States, determining excessive profits, the Board shall forthwith authorize and direct the Secretaries or any of them to eliminate such excessive profits (A) by reductions in the amounts otherwise payable to the contractor under contracts with the Departments, or by other revision of their terms; or (B) by withholding from amounts otherwise due to the contractor any amount of such excessive profits; or (C) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to a subcontractor, any amount of such excessive profits of such subcontractor; or (D) by recovery from the contractor, through repayment, credit, or suit any amount of such excessive profits actually paid to him; or (E) by any combination of these methods, as is deemed desirable. Actions on behalf of the United States may be brought in the appropriate courts of the United States to recover from the contractor any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. Each contractor and subcontractor is hereby indemnified by the United States against all claims by any subcontractor on account of amounts withheld from such subcontractor pursuant to this paragraph. All money recovered in respect of amounts paid to the contractor from appropriations from the Treasury by way of repayment or suit under

this subsection shall be covered into the Treasury as miscellaneous receipts. Upon the withholding of any amount of excessive profits or the crediting of any amount of excessive profits against amounts otherwise due a contractor, the Secretary shall certify the amount thereof to the Treasury and the appropriations of his Department shall be reduced by an amount equal to the amount so withheld or credited. The amount of such reductions shall be transferred to the surplus fund of the Treasury. In eliminating excessive profits the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in section 3806 of the Internal Revenue Code. For the purposes of this paragraph the term "contractor" includes a subcontractor.

(3) No proceeding to determine the amount of excessive profits shall be commenced more than one year after the close of the fiscal year in which such excessive profits were received or accrued, or more than one year after the statement required under paragraph (5) is filed with the Board, whichever is the later, and if such proceeding is not so commenced, then upon the expiration of one year following the close of such fiscal year, or one year following the date upon which such statement is so filed, whichever is the later, all liabilities of the contractor or subcontractor for excessive profits received or accrued during such fiscal year shall thereupon be discharged. If an agreement or order determining the amount of excessive profits is not made within one year following the commencement of the renegotiation proceeding, then upon the expiration of such one year all liabilities of the contractor or subcontractor for excessive profits with respect to which such proceeding was commenced shall thereupon be discharged, except that (A) if an order is made within such one year by the Secretary (or an officer or agency designated by the Secretary) pursuant to a delegation of authority under subsection (d) (4), such one-year limitation shall not apply to review of such order by

the Board, and (B) such one-year period may be extended by mutual agreement.

(4) For the purposes of this section the Board may make final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section. Such agreements may contain such terms and conditions as the Board deems advisable. Any such agreement shall be conclusive according to its terms; and except upon a showing of fraud or malfeasance or a willful misrepresentation of a material fact, (A) such agreement shall not for the purposes of this section be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States, and (B) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

(5) (A) Every contractor and subcontractor who holds contracts or subcontracts, to which the provisions of this subsection are applicable, shall, in such form and detail as the Board may by regulations prescribe, file with the Board on or before the first day of the fourth month following the close of the fiscal year (or if such fiscal year has closed on the date of the enactment of the Revenue Act of 1943, on or before the first day of the fourth month following the month in which such date of enactment falls), a financial statement setting forth such information as the Board may by regulations prescribe as necessary to carry out this section. In addition to the statement required under the preceding sentence, every such contractor or sub-contractor shall, at such time or times and in such form and detail as the Board may by regulations prescribe, furnish the Board any information, records, or data which is determined by the Board to be necessary to carry out this section. Any person who willfully fails or refuses to furnish any statement, information, records, or data required of them under this subsection, or who knowingly furnishes any such statement, information,

records, or data containing information which is false or misleading in any material respect, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both.

(B) For the purposes of this section the Board shall have the same powers with respect to any such contractor or subcontractor that any agency designated by the President to exercise the powers conferred by Title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of the Board and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purpose of making examinations and audits under this section.

(6) This subsection shall be applicable to all contracts and subcontracts, to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943, and whether or not such contracts or subcontracts contain the provisions required under subsection (b), unless (A) the contract or subcontract provides otherwise pursuant to subsection (i), or is exempted under subsection (i), or (B) the aggregate of the amounts received or accrued in such fiscal year by the contractor or subcontractor and all persons under the control of, or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts (including those described in clause (A), but excluding subcontracts described in subsection (a) (5) (B) do not exceed $500,000 and under subcontracts described in section (a) (5) (B) do not exceed $25,000 for such fiscal year. If such fiscal year is a fractional part of twelve months, the $500,000 amount and the $25,000 amount shall be reduced to the same

fractional part thereof for the purposes of this paragraph.

(d) (1) There is hereby created a War Contracts Price Adjustment Board (in this section called the "Board"), which shall consist of six members. One of the members shall be an officer or employee of the Department of War and shall be appointed by the Secretary of War, one shall be an officer or employee of the Department of the Navy and shall be appointed by the Secretary of the Navy, one shall be an officer or employee of the Department of the Treasury and shall be appointed by the Secretary of the Treasury, one shall be an officer or employee of the United States Martime Commission or the War Shipping Administration and shall be appointed jointly by the Chairman of the United State Maritime Commission and the Administrator of the War Shipping Administration, one shall be an officer or employee of the Reconstruction Finance Corporation and shall be appointed by the Chairman of the board of directors of the Reconstruction Finance Corporation, and one shall be an officer or employee of the War Production Board and shall be appointed by the Chairman of the War Production Board. The members of the Board shall not receive additional compensation for service on the Board but shall be allowed and paid necessary travel and subsistence expenses (or a per diem in lieu thereof) while away from their official station on duties of the Board. They shall elect a chairman from among their members. The Board shall have a seal which shall be judicially noticed.

(2) The principal office of the Board shall be in the District of Columbia, but it or any division thereof may meet and exercise its powers at any other place within the United States. The Board may establish such number of field offices throughout the United States as it deems necessary to expedite the work of the Board. Four members of the Board shall constitute a quorum, and any power, function, or duty of the Board may be exercised or performed by a majority of the members

present if the members present constitute at least a quorum.

(3) The Board is authorized, subject to the civil-service laws and the Classification Act of 1923, as amended, to employ and fix the compensation of such officers and employees as it deems necessary to assist it in carrying out its duties under this section. The Board may, with the consent of the head of the Department, agency, or instrumentality of the United States concerned, utilize the services of any officers or employees of the United States, and reimburse such Department, agency, or instrumentality for the services so utilized.

(4) The Board may delegate in whole or in part any power, function, or duty to the Secretary of a Department, and any power, function, or duty so delegated may be delegated in whole or in part by the Secretary to such officers or agencies of the United States as he may designate, and he may authorize successive redelegations of such powers, functions, and duties.

(5) The chairman of the Board may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member, designate the chief thereof. The Board may also, by regulations or otherwise, determine the character of cases to be conducted initially by the Board through an officer or officers of, or utilized by, the Board, the character of cases to be conducted initially by the various officers and agencies authorized to exercise powers of the Board pursuant to paragraph (4), the character of cases to be conducted initially by the various divisions of the Board, and the character of cases to be conducted initially by the Board itself. The Board may review any determination by any such officer, agency, or division on its own motion, or in its discretion at the request of any contractor or subcontractor aggrieved thereby. Unless the Board upon its own motion initiates a review of such determination within 60 days from the date of such determination, or at the request

of the contractor or subcontractor made within 60 days from the date of such determination initiates a review of such determination within 60 days from the date of such request, such determination shall be deemed the determination of the Board. Upon any review by the Board the Board may determine as the amount of excessive profits and amount either less than, equal to, or greater than that determined by the officer, agency, or division whose action is so reviewed.

(e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a

proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall the paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2).

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to

fiscal years ending before July 1, 1943, shall not apply.

(f) For repricing of war contracts, see Title VIII of the Revenue Act of 1943.

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

(h) This section shall apply only with respect to profits derived from contracts with the Departments and subcontracts which are attributable to performance prior to the termination date. For the purposes of this subsection—

(1) The profits derived from any contract with a Department or subcontract which shall be deemed "attributable to performance prior to the termination date" shall be—

(A) in the case of any contract or subcontract the performance of which requires more than twelve months, or in the case of any contract or subcontract with respect to which the powers of the Board are exercised separately pursuant to subsection (c) (1) rather than on a fiscal-year basis, the portion of the profits so derived which is determined by the Board to be equal to the same percentage of the total profits so derived as the percentage of completion of the contract prior to the termination date; and

(B) in all other cases, the profits so derived which are received or accrued prior to the termination date; and

(2) The term "termination date" means—

(A) December 31, 1944; or

(B) If the President not later than December 1, 1944, finds and by proclamation declares that competitive conditions have not been restored, such date not later than June 30, 1945, as may be specified by the President in such proclamation as the termination date; or

(C) If the President, not later than June 30, 1945, finds and by proclamation declares that competitive

conditions have been restored as of any date within six months prior to the issuance of such proclamation, the date as of which the President in such proclamation declares that competitive conditions have been restored;

except that in no event shall the termination date extend beyond the date proclaimed by the President as the date of the termination of hostilities in the present war, or the date specified in a concurrent resolution of the two Houses of Congress as the date of such termination, whichever is the earlier.

(i) (1) The provisions of this section shall not apply to—

(A) any contract by a Department with any other department, bureau, agency, or governmental corporation of the United States or with any Territory, possession, or State or any agency thereof or with any foreign government or any agency thereof; or

(B) any contract or subcontract for the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, which has not been processed, refined, or treated beyond the first form or state suitable for industrial use; or

(C) any contract or subcontract for an agricultural commodity in its raw or natural state, or if the commodity is not customarily sold or has not an established market in its raw or natural state, in the first form or state, beyond the raw or natural state, in which it is customarily sold or in which it has an established market. The term "agricultural commodity" as used herein shall include but shall not be limited to—

(i) commodities resulting from the cultivation of the soil such as grains of all kinds, fruits, nuts, vegetables, hay, straw, cotton, tobacco, sugar cane, and sugar beets;

(ii) natural resins, saps and gums of trees;

(iii) animals such as cattle, hogs, poultry, and sheep, fish and other marine life, and the produce of live animals, such as wool, eggs, milk and cream; or

(D) any contract or subcontract with an organization exempt from taxation under section 101 (6) of the Internal Revenue Code; or

(E) any contract with a Department, awarded as a result of competitive bidding, for the construction of any building, structure, improvement, or facility; or apply by reason of this paragraph.

(F) any subcontract, directly or indirectly under a contract or subcontract to which this section does not

(2) The Board is authorized by regulation to interpret and apply the exemptions provided for in paragraph (1) (A), (B), (C), (E), and (F), and interpret and apply the definition contained in subsection (a) (7).

(3) In the case of a contractor or subcontracotr who produces or acquires the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, and processes, refines, or treats such a product to and beyond the first form or state suitable for industrial use, or who produces or acquires an agricultural product and processes, refines, or treats such a product to and beyond the first form or state in which it is customarily sold or in which it has an established market, the Board shall prescribe such regulations as may be necessary to give such contractor or subcontractor a cost allowance substantially equivalent to the amount which would have been realized by such contractor or subcontractor if he had sold such product at such first form or state. Notwithstanding any other provisions of this section there shall be excluded from consideration in determining whether or not a contractor or subcontractor has received or accrued excessive profits that portion of the profits, derived from contracts with the Departments and subcontracts, attributable to the increment in value of the excess inventory. For the purposes of this paragraph the term "excess inventory" means inventory of products, hereinbefore described in this paragraph, acquired by the contractor or subcontractor in the form or at the state in which contracts for such

products on hand or on contract would be exempted from this section by subsection (i) (1) (B) or (C), which is in excess of the inventory reasonably necessary to fulfill existing contracts or orders. That portion of the profits, derived from contracts with the Departments and subcontracts, attributable to the increment in value of the excess inventory, and the method of excluding such portion of profits from consideration in determining whether or not the contractor or subcontractor has received or accrued excessive profits, shall be determined in accordance with regulations prescribed by the Board. In the case of a renegotiation with respect to a fiscal year ending prior to July 1, 1943, the portion of the profits, derived from contracts with the Departments and subcontracts, attributable to the increment in value of the excess inventory shall (to the extent such portion does not exceed the excessive profits determined) be credited or refunded to the contractor or subcontractor, and in case the determination of excessive profits was made prior to the date of the enactment of the Revenue Act of 1943, such credit or refund shall be made notwithstanding such determination is embodied in an agreement with the contractor or subcontractor, but in either case such credit or refund shall be made only if the contractor or subcontractor, within ninety days after the date of the enactment of the Revenue Act of 1943, files a claim therefor with the Secretary concerned.

(4) The Board is authorized, in its discretion, to exempt from some or all of the provisions of this section—

(A) any contract or subcontract to be performed outside of the territorial limits of the continental United States or in Alaska;

(B) any contracts or subcontracts under which, in the opinion of the Board, the profits can be determined with reasonable certainty when the contract price is established, such as certain classes of agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimum price

for the sale of which has been fixed by a public regulatory body, of leases and license agreements, and of agreements where the period of performance under such contract or subcontract will not be in excess of thirty days;

(C) any contract or subcontract or performance thereunder during a specified period or periods, if in the opinion of the Board, the provisions of the contract are otherwise adequate to prevent excessive profits;

(D) any contract or subcontract for the making or furnishing of a standard commercial article, if, in the opinion of the Board, competitive conditions affecting the sale of such article are such as will reasonably protect the Government against excessive prices;

(E) any contract or subcontract, if, in the opinion of the Board, competitive conditions affecting the making of such contract or subcontract are such as are likely to result in effective competition with respect to the contract or subcontract price; and

(F) any subcontract or group of subcontracts not otherwise exempt from the provisions of this section, if, in the opinion of the Board, it is not administratively feasible in the case of such subcontract or in the case of such group of subcontracts to determine and segregate the profits attributable to such subcontract or group of subcontracts from the profits attributable to activities not subject to renegotiation. The Board may so exempt contracts and subcontracts both individually and by general classes or types.

(j) Nothing in sections 109 and 113 of the Criminal Code (U. S. C., title 18, secs. 198 and 203) or in section 190 of the Revised Statutes (U. S. C., title 5, sec. 99) shall be deemed to prevent any person by reason of service in a Department or the Board during the period (or a part thereof) beginning May 27, 1940, and ending six months after the termination of hostilities in the present war, as proclaimed by the President, from acting as counsel, agent, or attorney for prosecuting any claim against the United States: *Provided,* That such person shall not prosecute any

claim against the United States (1) involving any subject matter directly connected with which such person was so employed, or (2) during the period such person is engaged in employment in a Department.

(k) Nothing in this section shall be construed to limit or restrict any authority or discretion of the Secretary of a Department under the provisions of any other law.

(l) This section may be cited as the "Renegotiation Act."

(c) *Technical Amendments.*—(1) Section 3806 (a) (1) (B) and (C) of the Internal Revenue Code (relating to mitigation of effect of renegotiation of war contracts) are respectively amended by striking out "by the Revenue Act of 1942."

(2) Section 3806 (b) (1) and (b) (2) of the Internal Revenue Code (relating to credit against repayment on account of renegotiation) are respectively amended by inserting after "Chapter 2A," wherever appearing therein "Chapter 2B,".

(3) Section 3806 (b) of the Internal Revenue Code is further amended by renumbering paragraphs (2) and (3) as paragraphs (3) and (4), respectively, and by inserting after paragraph (1) the following new paragraph:

(2) *Special rules as to individuals for 1942 and 1943.*—In the case of an individual subject to the provisions of sections 58, 59, and 60 of Chapter 1 and to the provisions of section 6 of the Current Tax Payment Act of 1943—

(A) No credit shall be allowed under paragraph (1) of this subsection for any amount by which the tax for the taxable year 1942 under Chapter 1 is decreased by the application of paragraph (1) or paragraph (2) of subsection (a). If, contrary to the foregoing provisions of this subparagraph, any part of the amount shown on the return as such tax for the taxable year 1942 or any part of an amount assessed as such tax for such year or as an addition to such tax

is credited against excessive profits eliminated for such year or against an amount disallowed for such year, the individual shall pay into the Treasury an amount equal to the amount of such credit, and if such amount is not voluntarily paid, the Commissioner shall, despite the provisions of the Current Tax Payment Act of 1943, collect the same under the usual methods employed to collect the tax imposed by Chapter 1. For the purposes of this section the amount required by this subparagraph to be paid into the Treasury shall be considered as an amount of excessive profits eliminated for the taxable year 1942, or an amount disallowed for such year, as the case may be; and despite the provisions of the Current Tax Payment Act of 1943, the payment of such amount shall not be considered as payment on account of the tax or estimated tax for the taxable year 1943.

(B) In the case of renegotiation with respect to the taxable year 1942 which is made after the enactment of the Current Tax Payment Act of 1943 and prior to the date on which the individual files his return for the taxable year 1943 and with respect to which payment or repayment of the excessive profits eliminated or any part thereof is deferred by agreement, if the amount shown as the tax on the return for the taxable year 1943 reflects the application of paragraph (1) of subsection (a) with respect to the taxable year 1942 and is computed in accordance with the provisions of section 6 of the Current Tax Payment Act of 1943, there shall be credited against the excessive profits eliminated for the taxable year 1942 the amount by which the sum of the estimated tax previously paid for the taxable year 1943 and the payments on account of the taxable year 1942 which are treated as payments on account of the estimated tax for the taxable year 1943, exceeds the amount shown as the tax on the return for the taxable year 1943: *Provided*, That the amount allowable as a credit under the foregoing provisions of this subparagraph shall not exceed (i) the amount of credit of overpayment

of tax provided for in the agreement deferring payment or repayment of excessive profits eliminated or (ii) the amount of excessive profits eliminated for the taxable year 1942 which, at the time the credit is allowed, have not been paid or repaid to the United States or an agency thereof or applied as an offset against other amounts due the individual. If any credit is allowed under this subparagraph, no other credit or refund under the internal revenue laws shall be made on account of the amount so allowed with respect to the taxable year 1943. Any credit of overpayment of tax allowed pursuant to the agreement deferring payment or repayment of excessive profits eliminated shall be considered as a credit allowed under this subparagraph.

(C) Except as prevented by the provisions of the foregoing subparagraph (B), there shall be credited against the amount of excessive profits eliminated for the taxable year 1942 the amount by which the tax for the taxable year 1943 as computed under section 6 of the Current Tax Payment Act of 1943 is decreased by reason of the application of paragraph (1) of subsection (a) with respect to the taxable year 1942; and there shall be credited against the amount disallowed for the taxable year 1942 the amount by which the tax for the taxable year 1943 as computed under section 6 of the Current Tax Payment Act of 1943 is decreased by reason of the application of paragraph (2) of subsection (a) with respect to the taxable year 1942.

For the purposes of the foregoing provisions of this paragraph, the terms "taxable year 1942" and "taxable year 1943" shall have the meanings assigned to them by section 6 (g) of the Current Tax Payment Act of 1943.

(4) The amendments made by paragraph (2) shall be effective as if they were a part of section 3806 of the Internal Revenue Code on the date of the enactment of the Revenue Act of 1942.

(d) *Effective Date.*—The amendments made by subsection (b) shall be effective only with respect to the fiscal

years ending after June 30, 1943, except that (1) the amendments inserting subsection (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (1) (D), (i) (1) (F), (i) (3), and (1) in section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, shall be effective as if such amendments and subsections had been a part of section 403 of such Act on the date of its enactment, and (2) the amendments adding subsection (d) and (e) (2) to section 403 of such Act shall be effective from the date of the enactment of this Act.

TITLE VIII—REPRICING OF WAR CONTRACTS

SEC. 801. REPRICING OF WAR CONTRACTS.

(a) As used in this section the terms "Department", "Secretary" and "article" shall have the same meanings as in subsection (a) of the Renegotiation Act.

(b) When the Secretary of a Department deems that the price of any article or service of any kind, which is required by his Department or directly or indirectly required, furnished, or offered in connection with, or as a part of, the performance or procurement of any contract with his Department or of any subcontract thereunder, is unreasonable or unfair, the Secretary may require the person furnishing or offering to furnish such article or service to negotiate to fix a fair and reasonable price therefor. If such person refuses to agree to a price for such article or service which the Secretary considers fair and reasonable, the Secretary by order may fix the price payable to such person for furnishing such article or service after the effective date of the order, whether under existing agreements or otherwise. The order may prescribe the period during which the price so fixed shall be effective and such other terms and conditions as the Secretary deems appropriate.

(c) Any person aggrieved by an order fixing a price under this section may sue the United States in any appropriate court. In such suit, such person shall be entitled to recover from the United States the amount of any difference between (1) fair and just compensation for the articles and services furnished under the terms of

the order and (2) the price fixed for such articles and services by the order; but if the prices so fixed by the order are found to exceed fair and just compensation for such articles and services, such person shall be liable to the United States in such suit for the amount of this excess. Any such suit shall be brought within six months after the order by the Secretary on which it is based, or after the expiration of the period or periods specified in such order, whichever last occurs. Such a suit shall not stay the order involved.

(d) Whenever any person wilfully refuses, or wilfully fails to furnish any such articles or services at the price fixed by an order of the Secretary in accordance with this section, the President shall have power to take immediate possession of the plant or plants of such person and to operate them in accordance with section 9 of the Selective Training and Service Act of 1940, as amended.

(e) The authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, or in any other Department with the consent of the Secretary of that Department, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(f) Every purchase order or agreement, or contract to make or furnish any article or service of any kind, which is required by a Department or directly or indirectly required, furnished, or offered in connection with, or as a part of, the performance or procurement of any contract with such Department or of any subcontract thereunder, shall, if made thirty days or more after the date of the enactment of this Act, be deemed to contain a provision under which the person making or furnishing such article or service agrees that notwithstanding other provisions of the purchase order, agreement, or contract, he shall be entitled to receive for such article or service only the fair and just compensation provided for in subsection (c).

SEC. 802. EFFECTIVE DATE.

(a) Section 801 shall be effective from the date of the enactment of this Act.

(b) Section 801 shall not apply to any contract with a Department or any subcontract made after the date proclaimed by the President as the date of the termination of hostilities in the present war or the date specified in a concurrent resolution of the two Houses of Congress as the date of such termination, whichever is the earlier.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 692

RING CONSTRUCTION CORPORATION, *Petitioner*

v.

THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 19) is reported at 102 F. Supp. 569.

JURISDICTION

The judgment of the Court of Claims was entered on February 5, 1952 (R. 29). The petition for a writ of certiorari was filed on April 7, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether a prior decision of the United States Court of Appeals for the District of Columbia Circuit in this same controversy, which was denied review by this Court on a previous petition for a writ of certiorari, is *res judicata* of the dispute.

STATUTES INVOLVED

Section 403(e) of the Renegotiation Act (Act of April 28, 1942, 56 Stat. 226, 245, 246), as amended by Section 701(b) of the Revenue Act of 1943 (Act of February 25, 1944, 58 Stat. 21, 78, 86-87) is set forth in the Appendix, *infra,* pp. 9-11. The entire Act and its various amendments are set forth in the Appendix to the Petition at pp. 16-56.

STATEMENT

This suit arises out of the renegotiation by the Secretary of War of two contracts between petitioner and the United States for the construction of certain buildings at Camp McCoy, Wisconsin. The relevant facts are not in dispute and are as follows:[1]

Final payment was made on the contracts subsequent to the enactment of the Renegotiation Act (Act of April 28, 1942, 56 Stat. 226) (R. 20). In

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[1] Because this dispute is clearly *res judicata,* we have set forth only the history of this litigation and not the underlying facts. The latter are set forth in our Brief in Opposition to a previous petition filed in this same controversy, No. 656, October Term, 1949, certiorari denied, 339 U.S. 943.

December 1943, the Secretary of War, acting pursuant to Section 403(c) of that Act, as amended, determined that petitioner should refund $1,365,000—less tax credits—to the Government as excessive profits earned on the contracts. Petitioner, pursuant to Section 403(e) of the Act, as amended by Section 701 of the Internal Revenue Act of 1943 (58 Stat. 21, 78), instituted a proceeding in the Tax Court for a redetermination of the amount, if any, of the alleged excess profits (R. 20). Petitioner argued in the Tax Court not only that he had not received excessive profits but that the Renegotiation Act could not constitutionally be applied to the fact situation in this case (R. 11). The Tax Court held that the Act, as applied, was constitutional and adjudged that petitioner had received excessive profits in the sum of $1,208,965.13, less tax credits, or a total of $210,479.31 (R. 20, 21, 8 T.C. 1070).

Petitioner sought review of the Tax Court's decision in the United States Court of Appeals for the District of Columbia Circuit (R. 21). The Court of Appeals held that it was without jurisdiction to review the Tax Court's decision except insofar as that Court had ruled on the constitutionality of the Renegotiation Act. It affirmed the Tax Court's holding that the Act was constitutional as applied to these contracts. *Ring Construction Corp.* v. *Secretary of War,* 178 F. 2d 714. Petitioner thereupon filed a petition for a writ of

certiorari in this Court, which was denied on April 24, 1950, 339 U.S. 943. That petition presented substantially the same questions which are presented here.

Prior to the redetermination by the Tax Court, the United States brought suit in the United States District Court for the District of Minnesota to collect from petitioner the amount determined by the Secretary of War to be due as excessive profits. Proceedings on that suit were stayed pending the outcome of the Tax Court litigation. After the denial of certiorari by this Court in the Tax Court proceeding, the District Court held that the Court of Appeals' decision was *res judicata.*[2] *United*

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[2] The proceedings in the District Court were somewhat complicated but there can be no question that the court properly passed on the question of *res judicata:* After the Tax Court's determination, while the appeal to the Court of Appeals was pending, petitioner paid to the United States the principal of the amount determined by the Tax Court to be due, but did not pay any interest. At the time that payment was made, both parties agreed that it was paid under protest, preserving any rights petitioner might have to recover it, or any part of it. The United States thereupon moved to dismiss its suit in the District Court, except insofar as it claimed interest, and petitioner asserted a counterclaim for the recovery of the amount paid. In the decision reported at 96 F. Supp. 762, the District Court dismissed the counterclaim to the extent that it exceeded the amount of interest sought by the United States, on the ground that it could not award an affirmative judgment against the United States on a counterclaim, and dismissed the counterclaim as a whole, to the extent that it was intended as a defense to the Government's claim for interest, on the ground that the Court of Appeals' decision was *res judicata.*

States v. *Ring Construction Corp.*, 96 F. Supp. 762.

Petitioner did not appeal from the District Court judgment, but brought suit in the Court of Claims (R. 1). The Court of Claims also held that the decision of the Court of Appeals was *res judicata* (R. 28).

ARGUMENT

This is the second attempt by petitioner to obtain review in this Court of the decision of a lower court in this dispute. The petition should be denied because the decision of the Court of Appeals for the District of Columbia Circuit, which was previously denied review by this Court, is *res judicata* of the issues involved, and, as was the case with the earlier petition, because it does not present questions which call for review by this Court.

1. This dispute demonstrates well the wisdom of the doctrine of *res judicata*. Petitioner has had its day in court. Indeed, it has already been in five courts, including three trial and two appellate courts, on precisely the same case during the past eight years. It has presented all the arguments which are made in this petition to this Court in a previous petition, which was denied, 339 U.S. 943. Petitioner has argued its case in the Tax Court, 8 T.C. 1070, in the Court of Appeals for the District of Columbia Circuit, 178 F. 2d 714, in this Court on the previous petition for a writ of certiorari, 339 U.S. 943, in the District Court for the District of Minnesota, 96 F. Supp. 762, and in the Court

of Claims below, 102 F. Sup. 569. The decision of the court below, that the prior judgment of the Court of Appeals for the District of Columbia Circuit, which was denied review by this Court, is *res judicata,* is clearly correct. In addition, the prior judgment of the Minnesota District Court is also *res judicata.* Petitioner is twice barred from litigating its claim in this proceeding.

2. Whatever arguments we might make on the merits in this Brief were made in our Brief in Opposition to the prior petition for a writ of certiorari (see Brief for the Respondent in Opposition in No. 656, October Term, 1949, pp. 8-20). If this Court should feel any need to examine the merits of petitioner's contentions, our arguments are fully set forth in that Brief. In short, they are these:

(a) Insofar as petitioner challenges the constitutionality of the application of the Renegotiation Act to contracts entered into prior to the effective date of that Act, its arguments are foreclosed by the decision of this Court in *Lichter* v. *United States,* 334 U.S. 742, where this Court held such an application of the Renegotiation Act to be constitutional.

(b) There is ample authority to sustain the constitutionality of the grant of exclusive jurisdiction to the Tax Court. See, *e.g., Crane* v. *Hahlo,* 258 U.S. 142; *Hilton* v. *Merritt,* 110 U.S. 97; *Passa-*

vant v. *United States*, 148 U.S. 214; *United States* v. *Ju Toy*, 198 U.S. 253; *Oceanic Navigation Company* v. *Stranahan*, 214 U.S. 320; cf. *Williamsport Co.* v. *United States*, 277 U.S. 551; *Heiner* v. *Diamond Alkali Co.*, 288 U.S. 502; see, also, *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 303-304; *Estep* v. *United States*, 327 U.S. 114, 120, 122-123; *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 76-82 (Brandeis, J., concurring). Moreover, we think that, although the issue was not raised there, the decision in *Lichter* v. *United States*, *supra*, contains an implicit approval of the grant of exclusive jurisdiction to the Tax Court.

3. The alleged conflict between the decision of the Court of Appeals for the District of Columbia Circuit, 178 F. 2d 714, which was held by the court below to be *res judicata* of this dispute, and the decision of the Court of Appeals for the Ninth Circuit in *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560, is no reason for granting review here. Petitioner seeks to challenge the constitutionality of the grant of exclusive jurisdiction to the Tax Court. The Court of Appeals for the District of Columbia Circuit has held that the grant was valid, but did not bar the Court of Appeals from considering constitutional or jurisdictional issues on appeal. The Court of Appeals for the Ninth Circuit in the *French* case, *supra*, held that because the Tax Court had exclusive juris-

diction, no court could review its decision even on questions of jurisdiction or constitutionality. Under the decision of either Court of Appeals petitioner could not prevail, and the final disposition would have been the same in whichever court petitioner had sued. The District of Columbia Circuit affirmed the Tax Court on the constitutional issue and refused to consider the other issues; the Ninth Circuit would have dismissed the appeal entirely. Insofar as this case is concerned, there is, therefore, no conflict between the decisions of the Courts of Appeals which calls for solution.

CONCLUSION

For the reasons set forth above, we respectfully submit that this petition for a writ of certiorari should be denied.

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MAY, 1952

APPENDIX

Section 403(e) of the Renegotiation Act, as amended by Section 701(b) of the Revenue Act of 1943 (Act of February 25, 1944, 58 Stat. 21, 78, 86-87) provides as follows:

> (e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers

and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115(a), 1116, 1117(a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c)(2).

(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a)(5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits,

which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

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